

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ROBOCAST, INC., )  
)  
Plaintiff, )  
) C.A. No. 22-304-RGA  
v. )  
)  
YOUTUBE, LLC, a Delaware limited )  
liability company; and GOOGLE )  
LLC, a Delaware limited )  
liability company, )  
)  
Defendants. )

J. Caleb Boggs Courthouse  
844 North King Street  
Wilmington, Delaware

Tuesday, December 20, 2022  
2:58 p.m.  
Oral Argument

BEFORE: THE HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

APPEARANCES:

BAYARD, P.A.  
BY: STEPHEN B. BRAUERMAN, ESQUIRE

-and-

CANTOR COLBURN  
BY: MARC N. HENSCHKE, ESQUIRE

For the Plaintiff

1 APPEARANCES CONTINUED:

2

3

RICHARDS LAYTON & FINGER, P.A.  
BY: FREDERICK L. COTTRELL, III, ESQUIRE

4

-and-

5

WILSON SONSINI GOODRICH & ROSATI  
BY: JORDAN R. JAFFE, ESQUIRE

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For the Defendants

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\*\*\* PROCEEDINGS \*\*\*

02:58:09 8

02:58:09 9

DEPUTY CLERK: All rise. Court is now in

02:58:09 10

session. The Honorable Richard G. Andrews presiding.

02:58:09 11

THE COURT: All right. Good afternoon,

02:58:11 12

everyone. Everyone be seated.

02:58:13 13

Mr. Brauerman.

02:58:14 14

MR. BRAUERMAN: Good afternoon, Your Honor.

02:58:19 15

Steve Brauerman from Bayard. I'm joined at counsel table by

02:58:23 16

Marc Henschke of Cantor Colburn on behalf of Plaintiff,

02:58:27 17

Robocast LLC. With Your Honor's permission, Mr. Henschke

02:58:30 18

will address the Court today.

02:58:31 19

THE COURT: That's fine. Good afternoon,

02:58:33 20

Mr. Henschke. It's been a few years.

02:58:35 21

MR. HENSCHKE: Yes.

02:58:36 22

THE COURT: Mr. Cottrell.

02:58:38 23

MR. COTTRELL: Yes. Good afternoon, Your Honor.

02:58:39 24

Fred Cottrell from Richards Layton & Finger for the

02:58:42 25

Defendants. With me at table from Wilson Sonsini, Jordan

02:58:48 1 Jaffe. And our clients are here, Jim Sherwood from Google  
02:58:51 2 and Robin Gray Schweitzer from Google. And with Your  
02:58:55 3 Honor's permission, Mr. Jaffe will discuss the transfer  
02:59:00 4 motion that we've filed.

02:59:02 5 THE COURT: All right. Thank you.

02:59:04 6 All right. So, Mr. Jaffe, I don't think I've  
02:59:06 7 seen you before; is that right?

02:59:10 8 MR. JAFFE: That's correct, Your Honor.

02:59:11 9 THE COURT: All right. Well, good afternoon.

02:59:12 10 MR. JAFFE: Good afternoon to you. I'm here  
02:59:16 11 today to address Defendants' transfer motion, as we just  
02:59:21 12 discussed. And I wanted to start by giving a brief overview  
02:59:25 13 of why this motion should be granted.

02:59:28 14 This case has no connection in terms of  
02:59:32 15 witnesses or documents to Delaware. In the course of  
02:59:37 16 transfer briefing, Defendants are not aware of any witnesses  
02:59:41 17 or documents here. Plaintiffs similarly identified no  
02:59:44 18 witnesses or documents here. The vast majority of the  
02:59:47 19 witnesses or documents are in the Northern District of  
02:59:51 20 California or are nearer to the Northern District of  
02:59:54 21 California than they are to the District of Delaware. It's  
03:00:00 22 also more convenient for the parties to be in the Northern  
03:00:03 23 District of California.

03:00:05 24 And in addition to Defendants being  
03:00:08 25 headquartered in the Northern District of California, we

03:00:12 1 have also identified third-party prior art residing in the  
03:00:16 2 Northern District of California. And in particular,  
03:00:20 3 potential unwilling witnesses in the transferee forum. We  
03:00:25 4 identified one, at least one prior artist in the forum who  
03:00:29 5 came up in the prior litigation and was in -- as a prior  
03:00:34 6 artist. And his prior art was asserted by the Defendants in  
03:00:38 7 that case on summary judgment.

03:00:39 8 So, this isn't the case where we just picked  
03:00:42 9 random prior artists out of a hat that happened to be in  
03:00:45 10 California. This was an actual prior artist who came up  
03:00:49 11 within the prior case and is located in the Northern  
03:00:52 12 District of California.

03:00:52 13 THE COURT: The prior art that was asserted on  
03:00:56 14 summary judgment, what was that?

03:00:57 15 MR. JAFFE: It's Mr. Braverman.

03:00:59 16 THE COURT: No. What kind of art was it? Was  
03:01:01 17 it a paper, or a patent or what?

03:01:04 18 MR. JAFFE: It was a paper, and I think there  
03:01:05 19 might have been a corresponding system, but I know the paper  
03:01:09 20 was asserted.

03:01:10 21 THE COURT: All right.

03:01:11 22 MR. JAFFE: The other two instances where  
03:01:13 23 we've -- where third-party witnesses are relevant here is  
03:01:17 24 Apple itself. As someone who's settled the patent, there  
03:01:21 25 will likely be relevant testimony and evidence relating to

03:01:25 1 damages, licenses, and so Apple will be a potential relevant  
03:01:30 2 witness for purposes of trial, which is subject to the  
03:01:34 3 subpoena power of that Court. These patents are also  
03:01:36 4 expired, and two of the three patents expired several years  
03:01:40 5 ago.

03:01:41 6 And in this instance, former employees become  
03:01:44 7 more relevant. And given that Defendants, YouTube and  
03:01:49 8 Google are both headquartered in the Northern District of  
03:01:53 9 California, the former employees would more likely be based  
03:01:55 10 there and, therefore, is subject to the Court's subpoena  
03:01:58 11 power.

03:01:58 12 Finally, in terms of overall convenience, we've  
03:02:01 13 talked a bit about how it's more convenient for the  
03:02:04 14 Defendants and third parties. When you look at the  
03:02:06 15 underlying facts that Plaintiff put in opposition to our  
03:02:08 16 motion, it's likely actually more convenient for Plaintiff  
03:02:12 17 than it is to be in Delaware. Specifically, they put in a  
03:02:17 18 declaration from a Mr. Torres, and that declaration was in  
03:02:23 19 Idaho. And they put in a statement to the Secretary of  
03:02:28 20 State in Idaho saying their principal office was there.  
03:02:30 21 That's closer to California than it is to here.

03:02:33 22 So, the CEO and sole inventor of the  
03:02:36 23 patents-in-suit is in Idaho and as well as their COO. So,  
03:02:42 24 they have identified two of their four employees are in  
03:02:45 25 Idaho. Two are in New York. So, in the balance, given

03:02:50 1 Defendants and third parties, as well as at least half of  
03:02:54 2 the employees on the Plaintiff's side --

03:02:56 3 THE COURT: So, I remember Mr. Torres because he  
03:03:02 4 used to come to Court for a lot of the proceedings which, of  
03:03:05 5 course, is because he was based in New York at the time.  
03:03:10 6 Coincidentally, like three or four years ago, he came up to  
03:03:13 7 me at an event in New York and introduced himself because I  
03:03:18 8 wouldn't have recognized him otherwise. And we spoke for  
03:03:21 9 like two minutes or so, you know, pleasantries. So, I  
03:03:26 10 remember him, but what I don't understand is with expired  
03:03:34 11 patents, and as far as the record shows, I think, it's not  
03:03:41 12 as though Robocast is making something or selling something.

03:03:46 13 I'm kind of wondering: What do the four  
03:03:49 14 employees do; do you know?

03:03:52 15 MR. JAFFE: So, we do not know. I think,  
03:03:55 16 reading their declaration, it's kind of vague as to what the  
03:03:58 17 business operations of the entity are. We do know that they  
03:04:05 18 raised some money recently. It's in one of their exhibits.  
03:04:10 19 But other than this litigation, we don't know what their  
03:04:14 20 operations are. I sort of defer to Plaintiff's counsel on  
03:04:18 21 what those specific operations are.

03:04:21 22 THE COURT: The money they raised, tell me more  
03:04:25 23 about that because I don't remember seeing that.

03:04:27 24 MR. JAFFE: Yes. It was something that I  
03:04:29 25 actually noticed in preparing for today's hearing. They

03:04:33 1 attached the Robocast LinkedIn profile. This is Exhibit T  
03:04:37 2 to their opposition, Docket Entry 34-20. And on ECF Page --

03:04:46 3 THE COURT: You don't need to tell me where it  
03:04:48 4 is, just tell me what it says.

03:04:50 5 MR. JAFFE: Okay. Sure. This is a LinkedIn  
03:04:52 6 post by Robocast. It says, "Ahead of our public launch, we  
03:04:57 7 are thrilled to be able to announce a follow-on investment  
03:04:59 8 (for an undisclosed amount) from Brown Venture Group,  
03:05:03 9 Dr. Chris Brooks, Dr. Paul Campbell, Chris Dykstra, Jerome  
03:05:07 10 Hamilton," and it says "-- BVG is an especially strategic  
03:05:13 11 addition to our growing list of follow-on investors in our  
03:05:16 12 currently active \$35 million Series B round. We look  
03:05:20 13 forward to our continued partnership during this exciting  
03:05:24 14 period of innovation."

03:05:25 15 THE COURT: Is there a date with this post?

03:05:28 16 MR. JAFFE: So, it's three -- it says three  
03:05:30 17 months ago from when this was printed, which was in  
03:05:34 18 November, November 9th. So...

03:05:37 19 THE COURT: All right. Go ahead.

03:05:40 20 MR. JAFFE: Sure. So, if I can back up, we  
03:05:47 21 think that the factors overwhelmingly support transfer in  
03:05:52 22 this instance. Other than the company being founded in  
03:05:56 23 Delaware and its strategic litigation choice is to sue here,  
03:06:00 24 there are no connections to Delaware. And, in fact, when we  
03:06:04 25 look at the evidence that's provided here, again, the bulk

of it is in California or closer to California.

Your Honor's decision in *Express Mobile vs. Web.com* provides a good roadmap to what the same result should be here. In that case, Defendants were asking for transfer to the Middle District of Florida, and the Plaintiffs were based in the Northern District of California. And Defendants were a Delaware corporation that was headquartered in Florida. And despite the Plaintiff being a Delaware corporation, Your Honor found that transfer was appropriate. And the same analysis should apply here.

And in particular, just to rebut a couple of their main points on this, they rely heavily on their choice of forum here in this district referring to it as a paramount consideration. And Your Honor addressed this exact point in the *Express Mobile* decision by saying, "By paramount, I understand the Court of Appeals to indicate that the Plaintiff's choice is the most important factor. That is the law. But beyond that, the balancing of factors is going to be influenced by other factors which are related to where a Plaintiff is physically located, et cetera. Thus, it is still the most important factor when a Plaintiff has a principal place of business outside Delaware or has no connection to Delaware other than its choice to sue here or other than its choice to sue here and its Delaware incorporation."



03:07:37 1 And we have the same facts here. We have a  
03:07:41 2 Delaware Plaintiff who is incorporated here and has chosen  
03:07:45 3 to sue here, but that alone isn't enough.

03:07:49 4 The other argument I want to address is their  
03:07:51 5 argument that Your Honor addressed, one of the three  
03:07:54 6 patents-in-suit before, and, therefore, by considerations of  
03:07:58 7 judicial economy, that the Court should keep the case. And,  
03:08:03 8 again, Your Honor's decision in Express Mobile, I think, is  
03:08:07 9 helpful on this one where --

03:08:10 10 THE COURT: Yeah, even though I think in that  
03:08:12 11 one didn't I say that I had essentially a glancing contact  
03:08:16 12 with the patent in the past, not -- I mean, I've got more to  
03:08:23 13 say about this, but the two Robocast cases I had before were  
03:08:28 14 litigated virtually up to the eve of trial. I think one of  
03:08:32 15 them was the eve of trial. The other one may have been not  
03:08:35 16 quite that close.

03:08:38 17 I still remember because it's the longest  
03:08:40 18 Markman hearing I ever had. I had a five-hour Markman  
03:08:44 19 hearing. I'm not going to do that again. You know, there  
03:08:49 20 was lots of briefing on summary judgment. You know, so I  
03:08:58 21 don't particularly remember it.

03:09:00 22 I assume I went through the pretrial conference  
03:09:03 23 at least for one of the two cases and, you know, probably  
03:09:06 24 decided motions in limine. And, I mean, short of actually  
03:09:13 25 having a trial, it would be hard to imagine that I would

03:09:16 1 engage with a patent as much as I did in those two cases,  
03:09:22 2 which I think is completely different than when I  
03:09:26 3 transferred the Express Mobile case.

03:09:29 4 MR. JAFFE: Yeah, I'd be happy to address that.  
03:09:32 5 So, I think there are two, what I'll call, flavors of the  
03:09:35 6 judicial economy argument here.

03:09:37 7 One is based on Your Honor's prior work on the  
03:09:39 8 Apple and Microsoft cases, and one is based on the  
03:09:42 9 co-pending case against Netflix. So, in addressing the  
03:09:45 10 Apple and Microsoft issue which you just brought up, I think  
03:09:49 11 there are a number of points of distinctions which are  
03:09:51 12 important here.

03:09:51 13 Number one is those are different Defendants  
03:09:53 14 with different accused technology, different issues. So,  
03:09:56 15 there are going to be different issues that come up in this  
03:09:58 16 case than in that case.

03:09:59 17 The second is the -- it only addressed one of  
03:10:03 18 the three patents-in-suit. So, the '451 Patent was at  
03:10:06 19 issue, but the other two patents were not at issue.

03:10:08 20 THE COURT: But the three patents here, don't  
03:10:11 21 they have the same specification?

03:10:12 22 MR. JAFFE: That's correct, Your Honor.

03:10:13 23 THE COURT: So, it's not like they're three  
03:10:17 24 different patents in different technology fields. They're  
03:10:21 25 basically the same invention, just claimed differently in

03:10:26 1 the subsequent patents.

03:10:27 2 MR. JAFFE: Yes, they are related patents. I  
03:10:29 3 absolutely agree with that. And I wasn't meaning to state  
03:10:33 4 that they're completely unrelated. There are just two new  
03:10:36 5 patents with additional claims to address that Your Honor  
03:10:40 6 didn't consider before. And prosecution history from each  
03:10:43 7 of those will be at issue that Your Honor didn't consider  
03:10:46 8 before.

03:10:47 9 And in addition, there's also the issue of the  
03:10:51 10 passage of time. I think Your Honor's mentioning when  
03:10:53 11 Mr. Torres came up to you, and you didn't recognize him is  
03:10:56 12 helpful in kind of elucidating this point that it's been a  
03:11:00 13 long time since those cases were litigated.

03:11:02 14 THE COURT: Yeah. No, I was going to say that.  
03:11:05 15 You know, honestly, in terms of the technology involved, I  
03:11:09 16 remember the same thing as anybody else who reads whatever  
03:11:13 17 paper trail I left. I have no -- you know, I remember the  
03:11:18 18 word nodes being very important because that's what we did  
03:11:22 19 spend the five hours on the Markman on, but I can't say that  
03:11:27 20 I'm very optimistic that any of this is going to come back  
03:11:31 21 to me faster than it would come back to some other judge  
03:11:34 22 starting from scratch.

03:11:35 23 MR. JAFFE: I think that's exactly right, Your  
03:11:37 24 Honor. And you're in good company in making that  
03:11:39 25 consideration because the Federal Circuit has found in the

03:11:44 1 Verizon case where there was a case which was settled five  
03:11:47 2 years, I think, before that case, and they just mentioned  
03:11:51 3 that the trial Court's previous handling of a lawsuit  
03:11:54 4 involving the same patent that settled more than five years  
03:11:57 5 before this suit was filed.

03:12:00 6 And I cut off the beginning of the sentence, but  
03:12:02 7 the next sentence is the key one which says, "The Eastern  
03:12:05 8 District of Texas would have to re-learn a considerable  
03:12:07 9 amount based on the lapse of time between the two suits and  
03:12:10 10 would likely have to familiarize itself with re-examination  
03:12:13 11 materials that were not part of the record during the  
03:12:15 12 previous suit."

03:12:16 13 So, we don't have a re-examination here, but we  
03:12:18 14 do have two different patents. And I think it's analogous  
03:12:22 15 and, logically speaking, it gets at the same result which  
03:12:24 16 is, yes, Your Honor, worked on those cases and a lot of work  
03:12:29 17 went into those cases, but they were different Defendants  
03:12:31 18 involving one of the three patents. And those cases were  
03:12:35 19 filed almost a decade ago.

03:12:37 20 THE COURT: They were filed more than a decade  
03:12:39 21 ago. I just got them a decade ago. But they were --  
03:12:43 22 somebody else was handling them before me. I don't --  
03:12:46 23 actually, never mind that. Yeah, they're a decade old.

03:12:49 24 MR. JAFFE: So, given the passage of time, those  
03:12:51 25 do not suggest transfer because, as Your Honor mentioned,

03:12:55 1 you're going to have to re-learn the materials just as much  
03:12:57 2 as any other judge would, in some instances, but not all.

03:13:01 3 THE COURT: So, you also said the co-pending  
03:13:07 4 case. You were going to address that.

03:13:10 5 MR. JAFFE: Yes. So, the second kind of flavor  
03:13:13 6 of judicial economy here is the co-pending case against  
03:13:17 7 Netflix. And there are a couple of distinctions there that  
03:13:19 8 I want to make clear.

03:13:20 9 Number one is that case is in its relative  
03:13:24 10 infancy. There's been no schedule.

03:13:26 11 THE COURT: Right. I mean, they were filed the  
03:13:27 12 same day.

03:13:28 13 MR. JAFFE: There's been no schedule set in that  
03:13:30 14 case. It is addressing the same three patents that are at  
03:13:33 15 issue in this case, but it's addressing different accused  
03:13:37 16 product, different technology, which means there's likely  
03:13:39 17 going to be significantly different discovery at issue, and  
03:13:43 18 therefore, is not the same for purposes of the transfer  
03:13:46 19 analysis.

03:13:47 20 THE COURT: Remind me of who the Defendant is in  
03:13:49 21 the other case.

03:13:50 22 MR. JAFFE: Netflix, Your Honor.

03:13:51 23 THE COURT: Where are they headquartered?

03:13:53 24 MR. JAFFE: They are headquartered in the  
03:13:56 25 Northern District of California, I believe.

03:14:00 1 THE COURT: Okay.

03:14:01 2 MR. JAFFE: On the point about the distinction  
03:14:04 3 of the co-pending case, if I can make two points. One is  
03:14:09 4 the Federal Circuit has repeatedly stated that the presence  
03:14:11 5 of a co-pending litigation by itself should not drive and  
03:14:16 6 tip the scales to keeping a case that otherwise should be  
03:14:19 7 transferred. I almost think back to kind of the difference  
03:14:21 8 between pre-AIA and post-AIA where you would kind of sue  
03:14:25 9 five Defendants to be able to anchor the lawsuit in one,  
03:14:28 10 even where one Defendant was properly transferred.

03:14:31 11 I think you can kind of make the same sort of  
03:14:34 12 argument here where the presence of Netflix staying here  
03:14:38 13 shouldn't outweigh the other considerations in the transfer.

03:14:40 14 THE COURT: In that regard, did you have any  
03:14:45 15 conversation with Netflix's counsel, because leaving aside  
03:14:52 16 all the transfer factors, it does seem relatively ridiculous  
03:14:59 17 to have one case here and one case in California on the same  
03:15:04 18 three patents when both cases could be here or both cases  
03:15:11 19 could be in California, but it seems like the worst possible  
03:15:15 20 solution is to have one case here and one case there.

03:15:19 21 MR. JAFFE: So, to address the first point is my  
03:15:23 22 understanding is Netflix is not moving to transfer which is  
03:15:27 23 public record.

03:15:27 24 THE COURT: So, they haven't filed a motion?

03:15:29 25 MR. JAFFE: Yeah. And so, that kind of is their

03:15:32 1 own choice. I think it goes back to 1404 being a  
03:15:35 2 case-by-case basis. I take Your Honor's point --

03:15:38 3 THE COURT: But Netflix isn't going to have any  
03:15:40 4 employees or documents here, either. I mean, they're going  
03:15:43 5 to be virtually -- I mean, I'm not trying to encourage them  
03:15:49 6 to file a motion, but they could make the exact same  
03:15:52 7 arguments you're making, I'm confident.

03:15:58 8 MR. JAFFE: I'm sure they could. And in terms  
03:16:02 9 of them being a candidate for transfer, they are based in  
03:16:05 10 the Northern District of California as well.

03:16:08 11 I think for our point, to address Your Honor's  
03:16:10 12 question in terms of the potential for two judges handling  
03:16:14 13 the same case, this, again, goes back to the point that 1404  
03:16:19 14 transfer should be done on an individualized case-by-case  
03:16:22 15 basis. And the pending case should not drive the transfer  
03:16:26 16 decision.

03:16:26 17 And there's actually a Federal Circuit case.  
03:16:29 18 This is arising from the Fifth Circuit going up to the  
03:16:33 19 Federal Circuit, so not directly from the Third Circuit, but  
03:16:35 20 I think gets at this exact point. It's the In Re: Dish  
03:16:39 21 Network decision where the Federal Circuit stated,  
03:16:45 22 "Moreover, each of BBiTV's co-pending suits in the Western  
03:16:49 23 District of Texas involve different Defendants with  
03:16:51 24 different hardware and different software. Thus, as in  
03:16:54 25 Samsung, they are, therefore, likely to involve

03:16:57 1 significantly different discovery and evidence. Applying  
03:17:00 2 the same analysis we applied in Samsung here requires that  
03:17:03 3 we conclude that any judicial economy considerations in  
03:17:07 4 keeping this case in Texas are insufficient to outweigh the  
03:17:11 5 clear benefits to transfer in light of the imbalance of the  
03:17:14 6 parties' respective presentations on the other private  
03:17:17 7 interests and public interest factors."

03:17:20 8 I would submit that the same thing is true here  
03:17:23 9 in terms of the -- just because they filed here in this case  
03:17:27 10 can't anchor another Defendant's case here because they've  
03:17:31 11 chosen not to file a motion to transfer.

03:17:33 12 THE COURT: So, one of the other things that I  
03:17:34 13 think the Plaintiff said talking about anchoring was on at  
03:17:45 14 least one occasion, and I think on more, Google's filed  
03:17:49 15 declaratory judgment actions here. And I think your  
03:17:55 16 response in your brief was, Well, jeez, they didn't want to  
03:17:58 17 be in Texas, so where else could they file it? But doesn't  
03:18:01 18 it seem that the argument that convenience requires transfer  
03:18:11 19 sort of -- don't you kind of contradict yourself, not you  
03:18:17 20 personally, but your company, your client by saying, well,  
03:18:20 21 when we want to transfer, you should transfer it. When you  
03:18:23 22 want to file suit in Delaware, you should keep it?

03:18:25 23 MR. JAFFE: Yeah. I'm happy to address that,  
03:18:29 24 Your Honor. There's two things I think to respond to that.

03:18:32 25 Number one, was the -- I think that you



03:18:34 1 mentioned the Geotag litigation. It was an instance where I  
03:18:38 2 think they had filed, you know, hundreds of lawsuits.

03:18:42 3 THE COURT: Oh, yeah, yeah. I don't remember  
03:18:43 4 the technology, but I remember the numbers.

03:18:45 5 MR. JAFFE: And in the filing that, the  
03:18:51 6 Plaintiff attached to their motion Google notes that  
03:18:54 7 Delaware was likely the only jurisdiction available other  
03:18:58 8 than Texas where they were filing the other lawsuits. So, I  
03:19:03 9 think that was kind of the reason why Delaware was the  
03:19:06 10 appropriate location.

03:19:07 11 But to answer Your Honor's question in terms of  
03:19:09 12 the inconsistency, it's just not relevant here because each  
03:19:13 13 case has to be addressed on its merits.

03:19:17 14 THE COURT: But in a way and, you know, and I  
03:19:22 15 don't question that you're accurately citing what the  
03:19:26 16 Federal Circuit has said from time to time, but it does seem  
03:19:42 17 relevant in some sense when we're talking about convenience  
03:19:48 18 that not only are you able to litigate in Delaware, which  
03:19:59 19 nobody ever questioned, but that sometimes, for one reason,  
03:20:08 20 that's where you choose to litigate. And not just, you  
03:20:11 21 know, you're sued in the Court of Chancery for something  
03:20:15 22 because you're a Delaware corporation, but that these very  
03:20:21 23 same kinds of cases that, you know, you're now saying the  
03:20:24 24 balance of convenience, you know, requires transfer to the  
03:20:33 25 Northern District, you know, some years ago, not you

03:20:37 1 personally, but someone was saying it would be an abuse of  
03:20:41 2 discretion for me to transfer a case to Texas where there  
03:20:45 3 were already 300 pending cases involving the same  
03:20:48 4 technology.

03:20:49 5 I mean, doesn't that just seem to have some  
03:20:58 6 relevance here?

03:20:59 7 MR. JAFFE: In terms of -- I think under the  
03:21:04 8 Federal Circuit's and the Supreme Court's discussion of 1404  
03:21:08 9 that each case has to be evaluated on and so on, I think  
03:21:11 10 that gets at the real answer to your question, which is  
03:21:14 11 let's say that we had the same accused functionality, the  
03:21:17 12 same witnesses, the same third-party witnesses at issue in  
03:21:20 13 this case as in the Geotag case. Then I think Your Honor  
03:21:23 14 would be exactly correct that there would be an incongruence  
03:21:27 15 between the two.

03:21:27 16 But here, the evidence that we put forward in  
03:21:30 17 terms of the convenience of the parties, convenience of the  
03:21:32 18 third parties, practical considerations on where the  
03:21:35 19 inventor of the patents-in-suit is closer to ND of Cal, all  
03:21:39 20 those considerations weigh in consideration of transfer  
03:21:42 21 here. So, I think the true answer to your question is just  
03:21:45 22 to look at the applications of the specific factors. And  
03:21:49 23 stepping back, the fact that Google is moving to transfer  
03:21:52 24 this suit, has not moved to transfer others and has filed  
03:21:54 25 here and others, gives credence to the fact that Google is

03:21:58 1 rationally thinking about these things and putting forth  
03:22:00 2 some judgment on which ones to file transfer motions and  
03:22:04 3 which ones are not because of the consideration of these  
03:22:06 4 factors.

03:22:06 5 THE COURT: Well, so one of the things that, you  
03:22:14 6 know, I do remember thinking about when I had the transfer  
03:22:18 7 motions, you know, it's not a technology thing. That's the  
03:22:23 8 reason I remember it. But when I had the transfer motions  
03:22:26 9 with Robocast a decade ago, one of the things, and I don't  
03:22:32 10 remember whether I put it down in the opinion or not, but it  
03:22:35 11 did seem that the imbalance between the size of the  
03:22:44 12 Defendants and Robocast, who I think at the time I made the  
03:22:49 13 decision I thought was pretty much a one-person operation --  
03:22:54 14 but if it had been a four-person operation, it wouldn't have  
03:22:58 15 been any different -- was that it seemed a lot like the  
03:23:04 16 transfer motion was just being used to try to gain leverage  
03:23:08 17 in the litigation. That any sort of rational analysis back  
03:23:14 18 then was Robocast located in New York, some history of being  
03:23:21 19 a Delaware corporation, close by. This was much more  
03:23:29 20 convenient for Robocast to litigate here than it was to  
03:23:33 21 litigate in the Northern District of California.

03:23:37 22 Now, today, yes, okay, Mr. Torres apparently  
03:23:40 23 lives in Idaho. And it does seem to me that, although  
03:23:48 24 Mr. Henschke may tell me something else, but it does seem to  
03:23:51 25 me like he's in between 95 and a hundred percent of

03:23:53 1 Robocast, and it's not quite as easy for him. And yet, he  
03:24:02 2 still put Delaware.

03:24:03 3 You know, and why shouldn't there be, for lack  
03:24:09 4 of a better word, some -- you know, leaving aside the  
03:24:12 5 paramount consideration, why shouldn't there be some  
03:24:16 6 acknowledgment that his resources are, as many of us are  
03:24:24 7 dwarfed by your resources, and that maybe that ought to  
03:24:28 8 count for more in his choice of where to sue?

03:24:32 9 MR. JAFFE: In terms of how that fits into the  
03:24:36 10 transfer analysis, I think I want to take it piece by piece.  
03:24:39 11 First, you mentioned his choice of where to sue. That is  
03:24:44 12 actually addressed under the paramount consideration  
03:24:46 13 factors. So, I think given that they are not a -- they  
03:24:49 14 don't have an office here, that is entitled to reduced  
03:24:53 15 weight.

03:24:53 16 In terms of the relative financial sizes of the  
03:24:58 17 parties, the record evidence indicates that they are a  
03:25:02 18 four-person company with the CEO and president present in  
03:25:05 19 Idaho. That is indisputably closer to California than it is  
03:25:10 20 to Delaware. So, if, you know, we're looking at the  
03:25:15 21 convenience of the parties here, simply saying I want to be  
03:25:19 22 in Delaware is not a convenience issue.

03:25:22 23 THE COURT: Well, you know, sometimes it is.  
03:25:24 24 There's a lawyer in the Northern District of California who,  
03:25:30 25 you know, I've met at other events and, you know, she's

1 explained that her parents live in New Jersey, and that  
2 that's why Delaware is convenient for her clients because  
3 she likes to come to Delaware so she can go visit her  
4 parents. And, you know, it's not hard for me to believe  
5 though, you know, it's complete speculation, that Mr.  
6 Torres, who I gather, based on my random meeting of him a  
7 few years ago, and what I kind of recall about, you know,  
8 the Lower East side or something back in 2011 or '12, I  
9 wouldn't be surprised if it's not convenient for him to come  
10 east because he's -- probably most of the people he knows in  
11 the world still live in New York City.

12 MR. JAFFE: You know, Mr. Torres did not put  
13 that in his declaration.

14 THE COURT: It's conceded.

15 MR. JAFFE: And to the extent that they had put  
16 forward evidence that he has relatives or it is in some  
17 sense more convenient for him to come here because it has  
18 proximity to New York, they didn't put in that evidence.  
19 And I think going back to Your Honor's prior issue of  
20 transfer, I think it's notable because the facts have  
21 changed since that decision in important ways.

22 Number one, we have obviously different  
23 Defendants at issue and so there's different evidence.  
24 There are different third parties that we've identified  
25 relevant to the transfer analysis, including Mr. Braverman,

03:27:07 1 as I mentioned before. And the structure of Robocast in the  
03:27:11 2 presence has changed.

03:27:13 3 In Your Honor's prior Order, you noted that  
03:27:15 4 Mr. Torres came to the courtroom for purposes of the  
03:27:18 5 transfer hearing. I note that he signed a declaration. The  
03:27:23 6 only fact declaration that they put in in response to our  
03:27:26 7 opposition other than an attorney declaration was from  
03:27:29 8 Mr. Torres from Idaho. So, the facts have changed.

03:27:34 9 In addition, we noted that their principal  
03:27:37 10 office appears to be in Idaho. And two of the four  
03:27:40 11 employees, including the sole named inventor of all three  
03:27:43 12 patents, is in Idaho.

03:27:45 13 So, as a net point here is what Your Honor  
03:27:53 14 looked at previously in those Apple and Microsoft cases, the  
03:27:56 15 facts have changed. And because we're dealing with different  
03:27:58 16 facts, the outcome changes as well.

03:28:01 17 One other point that I'll mention in terms of  
03:28:03 18 the difference between the prior Robocast transfer analysis  
03:28:05 19 and ours is the Plaintiffs in those cases mentioned, kind of  
03:28:10 20 listed all the prior art that they could find on the face of  
03:28:13 21 the patent. Isolated, you know, some half dozen or a  
03:28:16 22 quarter that were in the Northern District of California,  
03:28:18 23 and said, See, here are the prior artists that are in  
03:28:21 24 California within the subpoena power.

03:28:23 25 As I mentioned before, we have the benefit of

03:28:26 1 looking at that prior litigation and seeing that at least  
03:28:29 2 Mr. Braverman and some other prior art as well were based in  
03:28:33 3 the Northern District of California and subject to the  
03:28:36 4 subpoena power there. That was not something that Your  
03:28:39 5 Honor had the benefit of in those prior transfer motions  
03:28:41 6 that we do now.

03:28:42 7 THE COURT: In the declaration and whatever  
03:28:48 8 evidence you submitted, I think there were, besides from  
03:28:52 9 Mr. Braverman, there was a second prior artist. Did you  
03:29:00 10 actually show that they live today in the Northern District  
03:29:05 11 of California?

03:29:05 12 MR. JAFFE: So the second one is our counsel --  
03:29:07 13 opposing counsel pointed out she appears to have moved to  
03:29:10 14 Washington.

03:29:11 15 THE COURT: Okay.

03:29:12 16 MR. JAFFE: But the paper itself, it has on its  
03:29:16 17 title it came out of what's called Xerox PARC which is in  
03:29:19 18 Palo Alto. So, even if the prior artist has moved to  
03:29:23 19 Washington, which is still closer to the Northern District  
03:29:26 20 than it is to Delaware, the source --

03:29:28 21 THE COURT: But not within the subpoena power of  
03:29:30 22 either?

03:29:30 23 MR. JAFFE: Absolutely, Your Honor. You're  
03:29:32 24 correct. But the source of the prior art, which is Xerox  
03:29:36 25 PARC, is still within the subpoena power of the Northern

03:29:38 1 District. So, we could subpoena the actual company for  
03:29:41 2 records about the prior art system and about the prior art  
03:29:44 3 paper, but I grant you that the actual individual has moved.

03:29:47 4 THE COURT: And what about Mr. Braverman?

03:29:50 5 MR. JAFFE: As best we can tell from his  
03:29:52 6 LinkedIn, he is in the Northern District of California.

03:29:55 7 THE COURT: Okay. Well, so I've given you  
03:29:57 8 plenty of time here. I should hear from Mr. Henschke. I've  
03:30:01 9 got the general -- I think I understand most of your  
03:30:06 10 arguments here.

03:30:07 11 MR. JAFFE: Thank you, Your Honor.

03:30:08 12 THE COURT: Thank you, Mr. Jaffe.

03:30:19 13 MR. HENSCHKE: Thank you, Your Honor. I guess I  
03:30:22 14 would say, first, before I get into what I planned to talk  
03:30:26 15 about, one thing I did not expect to hear today was Google  
03:30:29 16 making representations about what's in the best interest of  
03:30:33 17 Robocast and where Robocast should believe it's most  
03:30:37 18 convenient to litigate.

03:30:38 19 Robocast has chosen to file suit in Delaware, as  
03:30:42 20 it always has historically. Mr. Torres has filed the  
03:30:46 21 declaration asserting that Delaware is by far more  
03:30:49 22 convenient for himself and the company to be litigating in  
03:30:53 23 the Northern District of California. And I'm not sure how  
03:30:57 24 Google can possibly stand here and say that Robocast's  
03:31:01 25 interests are other than what the only evidence of record



03:31:03 1 suggests Robocast's interests are.

03:31:07 2 A lot of free forum kind of issues came up here  
03:31:11 3 in the initial discussion with Mr. Jaffe, and I'll try my  
03:31:15 4 best to respond to those and work them in. But I think the  
03:31:19 5 main thing that's missing here and that's been missing from  
03:31:22 6 this discussion is tying these facts into the appropriate  
03:31:28 7 legal standards, the appropriate burden of proof, the  
03:31:31 8 appropriate Jumara factors, and look at what those legal  
03:31:35 9 requirements actually are, because a lot of the things that  
03:31:38 10 have been discussed and a lot of the way the facts have been  
03:31:41 11 laid out don't really respond to what the legal requirements  
03:31:44 12 are here.

03:31:44 13 So, starting with the burden of proof, I mean, I  
03:31:48 14 think that really begins and ends this whole issue of  
03:31:50 15 transfer here. There is a -- on any moving party for a  
03:31:55 16 transfer motion, there's an extremely heavy burden of  
03:31:58 17 proving that these Jumara factors weigh strongly in favor of  
03:32:02 18 transfer.

03:32:03 19 And here, I would suggest, and you have  
03:32:05 20 suggested in your prior cases, that that heavy burden is  
03:32:08 21 heightened even further given the profile of these  
03:32:12 22 particular Defendants. As this Court held in its InvestPic  
03:32:16 23 case and elsewhere, when you have multi-billion-dollar  
03:32:20 24 companies like Google-YouTube who are doing business on an  
03:32:24 25 international scale, the burden of proving transfer is even

03:32:28 1 higher than normal. And it's already a high burden in the  
03:32:31 2 first place.

03:32:31 3 So, at the end of the day, the burden of proof,  
03:32:34 4 I would suggest, is what this Court itself previously  
03:32:37 5 suggested in the cases that Robocast brought against Apple  
03:32:43 6 and Microsoft which Your Honor handled for three-and-a-half  
03:32:47 7 years in great depth. And what Your Honor said in that  
03:32:51 8 decision in that case denying transfer to the Northern  
03:32:58 9 District of California under similar circumstances is, "I  
03:33:01 10 think that when the Plaintiff is a three-person corporation  
03:33:05 11 with Delaware as its long-standing corporate home and the  
03:33:08 12 Defendant is Apple, there ought to be a compelling reason to  
03:33:12 13 overcome Plaintiff's choice of forum."

03:33:15 14 So, this is the situation we're in here, and  
03:33:19 15 Google-YouTube has not demonstrated anything close to a  
03:33:22 16 compelling reason why this case should be transferred to the  
03:33:26 17 Northern District of California. To the contrary, several  
03:33:31 18 of the most important of the Jumara factors strongly favor  
03:33:35 19 keeping the case here in Delaware. And so, I would submit  
03:33:39 20 to the Court that it would be impossible for Google-YouTube  
03:33:42 21 here to meet that kind of heightened burden.

03:33:45 22 So, Jumara private interest factors. I guess  
03:33:51 23 the first point I would make would be that not all factors  
03:33:54 24 are created equal. There, obviously, in the law are some of  
03:33:58 25 these factors which have been, especially in the Third

03:34:01 1 Circuit, accorded a great deal of more importance than  
03:34:03 2 others.

03:34:04 3 And the quintessential example of that, of  
03:34:08 4 course, is factor one, which is the Plaintiff's forum  
03:34:12 5 preference. Under Third Circuit law, that's to be treated  
03:34:15 6 by far as the most important of any of the factors in the  
03:34:18 7 balancing test. And essentially, so long as Plaintiff has  
03:34:23 8 legitimate and rational reasons for its choice of forum, the  
03:34:27 9 Third Circuit says that that should be the paramount  
03:34:31 10 consideration in deciding appropriate venue.

03:34:34 11 So, does Robocast have legitimate and rational  
03:34:38 12 reasons for having brought this suit in Delaware? Well, of  
03:34:41 13 course, it does. It has several different legitimate  
03:34:44 14 reasons.

03:34:44 15 Starting, first of all, that all of these  
03:34:48 16 entities here, including Robocast and including the  
03:34:51 17 Defendants, are long-standing Delaware companies, all of  
03:34:54 18 whom have willingly submitted to being sued in this state.

03:34:58 19 Secondly, all of Robocast's previous patent  
03:35:03 20 infringement litigations involving the same patents and the  
03:35:06 21 same technology were brought in Delaware and, indeed, were  
03:35:10 22 handled by Your Honor back in the early days of Your Honor's  
03:35:14 23 judgeship. Those prior litigations have extensively  
03:35:19 24 familiarized this Court with the patents and the technology  
03:35:23 25 and --

03:35:24 1 THE COURT: Theoretically, yes, but  
03:35:25 2 realistically, no. The only advantage is perhaps I can read  
03:35:30 3 my prior opinion better than someone who didn't write them  
03:35:34 4 in the first place. But --

03:35:36 5 MR. HENSCHKE: Well, I've, you know, had to go  
03:35:38 6 through the same exercise that you will, Your Honor, and  
03:35:40 7 trust me, it comes back very quickly. And it certainly  
03:35:43 8 comes back --

03:35:44 9 THE COURT: Maybe for you.

03:35:45 10 MR. HENSCHKE: Yes. It comes back far more  
03:35:47 11 quickly than some judge who has absolutely no familiarity  
03:35:50 12 with these patents or technology in Northern California who  
03:35:54 13 is essentially starting from scratch.

03:35:57 14 The other aspect of this is, you know, in  
03:36:01 15 addition to all the familiarity and the hard work the Court  
03:36:03 16 and the parties put in in this district to developing those  
03:36:07 17 issues, there's a lot of very extensive and helpful  
03:36:11 18 precedent on issues that are important to these cases that  
03:36:14 19 Your Honor has established. Your Honor issued a Markman  
03:36:19 20 Claim Construction Order that covers the very patent that's  
03:36:21 21 at the heart of this case right now, the '451 parent Patent,  
03:36:24 22 which is very viable today and, indeed, is being used today  
03:36:30 23 as we stand here in IPRs where your Claim Construction  
03:36:35 24 Orders have literally been submitted and are dictating the  
03:36:38 25 outcome of the IPR process. Right.

03:36:40 1 THE COURT: Sorry, there's IPRs on these  
03:36:42 2 patents?

03:36:43 3 MR. HENSCHKE: Yes, there recently have been  
03:36:45 4 filed IPRs. Whether they end up being instituted or not, I  
03:36:48 5 don't know.

03:36:49 6 THE COURT: I didn't know the PTAB could do IPRs  
03:36:56 7 on expired patents. But they can?

03:36:59 8 MR. HENSCHKE: There's some debate about that in  
03:37:02 9 those particular IPRs, but they believe they can at the  
03:37:06 10 moment.

03:37:07 11 THE COURT: Okay.

03:37:08 12 MR. HENSCHKE: But, in any event, your claim  
03:37:10 13 construction is what's being used as the basis of those IPR  
03:37:13 14 analyses. You also made extensive summary judgment rulings  
03:37:17 15 on invalidity issues, and infringement issues, and  
03:37:21 16 damages-related issues, and prior conception-related issues,  
03:37:25 17 inequitable conduct issues. I mean, this was  
03:37:29 18 three-and-a-half years of intensive litigation. And the  
03:37:31 19 amount of substantive decisionmaking and work that Your  
03:37:34 20 Honor put into this is the highest level it could possibly  
03:37:38 21 be. And all of that stuff continues to be highly relevant  
03:37:41 22 and will be in these cases. So, it's not just the  
03:37:44 23 familiarity that you developed with this, which I believe  
03:37:47 24 can be recaptured, but it's also the important body of  
03:37:51 25 precedent that's sitting there.

03:37:52 1 Another reason, of course, Robocast has a  
03:37:57 2 legitimate basis for suing in Delaware is that its companion  
03:38:01 3 case against Netflix, as you said, filed on the same day is  
03:38:05 4 here in Delaware. Exact same patents. Same type of accused  
03:38:08 5 technology. No evidence whatsoever that Netflix is  
03:38:14 6 intending to try to move the case out of Delaware.

03:38:16 7 THE COURT: So, under Federal Circuit precedent,  
03:38:19 8 do you think I can consider the co-pending case?

03:38:26 9 MR. HENSCHKE: Can and must. I mean, when  
03:38:28 10 you're talking about practical considerations under the  
03:38:32 11 public interest factors of Jumara, judicial efficiency --

03:38:37 12 THE COURT: Well, so I haven't gone back and  
03:38:44 13 checked this, but my memory of opinions of the Federal  
03:38:50 14 Circuit that I've seen and, you know, when there's a  
03:38:54 15 transfer opinion usually in the mandamus context, I tend to  
03:38:59 16 read those. And I think I've seen a number of times where  
03:39:06 17 they have done kind of what I think Mr. Jaffe said, which is  
03:39:11 18 basically said that the co-pending case is irrelevant.

03:39:15 19 MR. HENSCHKE: I'm not aware of that, Your  
03:39:19 20 Honor. And, indeed, in the cases that are cited in the  
03:39:21 21 record here quite the opposite would be true. Google's  
03:39:25 22 referred to the Verizon case, and in that case it was about  
03:39:31 23 the fact that the only basis for maintaining venue was that  
03:39:35 24 the Court had previously, you know, handled similar cases in  
03:39:38 25 the past.

03:39:39 1 THE COURT: Well, that's in the past.

03:39:41 2 MR. HENSCHKE: Yeah, but the Court expressly  
03:39:43 3 distinguished that situation from another case called  
03:39:47 4 Vistaprint. And the difference between those two cases was  
03:39:49 5 that in Vistaprint, there was a currently co-pending case  
03:39:53 6 involving the same patents. So, the Federal Circuit said in  
03:39:56 7 the one instance, just having had past cases and nothing  
03:39:59 8 else in favor of maintaining venue isn't good enough. But  
03:40:02 9 in the other case in Vistaprint, when you combine having  
03:40:05 10 handled the past cases with the fact that there's now a  
03:40:09 11 currently co-pending case, that is good enough. And that  
03:40:12 12 was the distinction between those two cases.

03:40:15 13 So, obviously, it is important in the case law.  
03:40:19 14 And beyond that, of course, as Your Honor already said, it's  
03:40:23 15 important from just common understanding of judicial  
03:40:26 16 efficiency. It would make absolutely no sense to have a  
03:40:30 17 case involving the same exact patents in the same kind of  
03:40:33 18 technology, have two cases, one tried in Delaware and one  
03:40:37 19 tried in the Northern District of California at the same  
03:40:39 20 time.

03:40:40 21 Obviously, the amount of duplicative and  
03:40:42 22 overlapping work would be highly inefficient. The  
03:40:47 23 possibility of inconsistent rulings and decisions would be  
03:40:50 24 very much in play. And so, you want to avoid that situation  
03:40:53 25 whenever you can.

03:40:54 1 And what we know about the current situation is  
03:40:57 2 that there's a companion case here against Netflix involving  
03:41:03 3 the same stuff, and they haven't shown any sign of trying to  
03:41:06 4 get it out of California, I think because they realize how  
03:41:09 5 weak a motion it would be to try to do so. So, there's  
03:41:13 6 another very valid reason for Robocast to want to keep this  
03:41:16 7 case in Delaware.

03:41:17 8 And then beyond that, you know, Robocast has  
03:41:20 9 many of its key operational employees, and legal  
03:41:24 10 representatives and documents all here on the East Coast  
03:41:29 11 nearby to Delaware. So --

03:41:34 12 THE COURT: But the Third Circuit, when it talks  
03:41:39 13 about where documents are, the fact that it says distinguish  
03:41:44 14 between documents that are subject to subpoena power of the  
03:41:49 15 Court and --

03:41:54 16 MR. HENSCHKE: Yes. I'm not addressing this in  
03:41:56 17 the context of the books and records prong of the Jumara  
03:41:59 18 test, which I'll get to. What I'm talking about now is:  
03:42:02 19 Does Robocast have legitimate reasons for wanting to be here  
03:42:05 20 in Delaware?

03:42:06 21 THE COURT: All right. Yeah. I mean, as far as  
03:42:08 22 I'm concerned, yeah, they have legitimate reasons. I don't  
03:42:12 23 think that's a problem.

03:42:13 24 MR. HENSCHKE: So, to explain some things that  
03:42:16 25 were at issue in the previous discussion here, if you look



03:42:19 1 at the Torres declaration, what you'll see is that the two  
03:42:23 2 people running the day-to-day operations of the company --

03:42:27 3 THE COURT: What are the day-to-day operations  
03:42:29 4 of the company? Does the declaration say that? Because  
03:42:32 5 it's --

03:42:34 6 MR. HENSCHKE: I guess, I don't know that it  
03:42:35 7 lays it out as explicitly as that, but it certainly gives  
03:42:39 8 some indications. What is the company up to? Well,  
03:42:42 9 obviously, this litigation is a big piece of it, first of  
03:42:45 10 all.

03:42:46 11 Second of all, another thing that the  
03:42:49 12 declaration does mention is that the company's in the  
03:42:52 13 process of getting ready to release its latest wave of  
03:42:57 14 software products which it's working on. Those are all  
03:43:01 15 largely being outsourced to third-party contractors who are  
03:43:05 16 mostly in Europe, so I don't know that that really affects  
03:43:10 17 the jurisdictional analysis at all.

03:43:12 18 And, of course, we talked about the fact that  
03:43:13 19 Robocast is out there raising capital in order to finance  
03:43:18 20 its software development efforts and perhaps its litigation  
03:43:21 21 efforts. So, it's some combination of all those things.  
03:43:24 22 But what the Torres declaration tells you is that the two  
03:43:28 23 people responsible for day-to-day operations of the company  
03:43:31 24 are both right here on the East Coast. One of those is the  
03:43:36 25 president, Ed Robertiello, who is responsible for sort of

03:43:38 1 the day-to-day business operations of the company. He's in  
03:43:41 2 New Jersey.

03:43:42 3 And the second is Brett Smith, who's vice  
03:43:45 4 president of legal and IP, who handles all the  
03:43:49 5 patent-related matters and who oversees the litigation and  
03:43:52 6 all that kind of thing. He is located in New York City.

03:43:55 7 And I should point out Brett Smith was the  
03:43:58 8 principal Rule 30(b)(6) witness on behalf of Robocast in the  
03:44:03 9 two earlier cases against Microsoft and Apple.

03:44:08 10 So, these are not inconsequential witnesses.  
03:44:11 11 These are the two witnesses running the business operations,  
03:44:13 12 which is exactly what the Torres declaration says. And  
03:44:17 13 they're in New York and New Jersey.

03:44:19 14 All of Robocast's litigation counsel, including  
03:44:22 15 myself, are here on the East Coast, principally in New York  
03:44:26 16 City. All of Robocast's patent prosecution counsel  
03:44:30 17 responsible for prosecuting all the patents at issue in this  
03:44:33 18 case are here in New York City. All of Robocast's documents  
03:44:38 19 are here in -- nearby in New York City. All the corporate  
03:44:43 20 documents, all the documents relating to the prior  
03:44:45 21 litigations with Microsoft and Apple which are, obviously,  
03:44:48 22 going to be a big focal point of these cases.

03:44:52 23 So, there's yet another reason why Robocast's  
03:44:56 24 coming to Delaware is legitimate and rational. And as Your  
03:45:01 25 Honor suggested, once you know that, then you know that the

burden of proof becomes incredibly high for Google to overcome, and that it requires compelling reasons of the sort that we haven't heard anything about here at all.

Moving on, another very important Jumara private interest factor would be convenience of the parties as indicated by their relative physical and financial condition. And so, that's what the legal standard means by convenience of the parties, as indicated by their relative physical and financial condition. And here you cannot possibly have a greater disparity between Google-YouTube's financial position and Robocast's, right. We're talking about Robocast being a four-person company with no current revenues and di minimus assets. And by contrast, you know, Google-YouTube indisputably one of the world's biggest, and largest and wealthiest companies who just earned \$257 billion in revenue in 2021.

So, when Your Honor was assessing this very same kind of disparity in Robocast's previous cases against Apple and Microsoft, this Court found that Robocast's financial condition "pales in comparison to Apple's and that this factor of the balancing test, therefore, significantly disfavors transfer." Those are Your Honor's words in exactly the kind of situation that we're confronting here under factor four, convenience of the parties.

And in addition, because Google and YouTube are

03:46:38 1 Delaware companies, this Court has previously held that they  
03:46:42 2 must demonstrate a "unique and unexpected burden" in having  
03:46:47 3 to litigate in Delaware in order for this test factor to  
03:46:50 4 favor transfer. Is there some unique and unexpected burden  
03:46:54 5 for Google and YouTube to litigate this case here? Of  
03:46:57 6 course not.

03:46:59 7 And as Your Honor pointed out, Google and  
03:47:02 8 YouTube are litigating here in Delaware all the time. We  
03:47:05 9 have submitted evidence with our papers showing that just in  
03:47:09 10 recent years alone, Google has been a party in 38 different  
03:47:15 11 litigations in this Court, many of which --

03:47:17 12 THE COURT: I would think -- how many of them  
03:47:20 13 were they the Defendant?

03:47:21 14 MR. HENSCHKE: Many of which they were the  
03:47:23 15 Plaintiff. We've shown other instances in which --

03:47:25 16 THE COURT: How many of them were they the  
03:47:27 17 Plaintiff?

03:47:27 18 MR. HENSCHKE: Either six or nine.

03:47:33 19 THE COURT: Okay.

03:47:33 20 MR. HENSCHKE: We've shown other instances where  
03:47:35 21 Google has moved to transfer cases into Delaware. We've  
03:47:38 22 shown other instances where Google has resisted efforts to  
03:47:42 23 transfer cases out of Delaware. So, you know, that's not  
03:47:46 24 quite what convenience of the parties actually means under  
03:47:49 25 the Jumara factor, but, obviously, it's not inconvenient at

03:47:53 1 all for a company of that astronomical wealth, and resource  
03:47:57 2 base and experience in this district to be litigating here  
03:48:00 3 in this district.

03:48:01 4 And meanwhile, Robocast, with no funds and no  
03:48:05 5 connection to California, is being questioned about whether  
03:48:10 6 it would be more convenient for Robocast to litigate in  
03:48:13 7 California. It's not even close to possible.

03:48:16 8 So, the remaining Jumara private interest  
03:48:21 9 factors, I would suggest only one of them favors even  
03:48:26 10 arguably Google-YouTube in this case. Factor number two,  
03:48:30 11 Defendant's forum preference. But, of course, this factor  
03:48:33 12 carries very little weight in the overall balancing test  
03:48:36 13 compared to the other factors we've talked about. I mean,  
03:48:39 14 if all it took for a company to get transferred out of  
03:48:42 15 Delaware was to come in here and say, We'd prefer to be on  
03:48:46 16 our home turf in Silicon Valley because that's where our  
03:48:49 17 headquarters and some of our employees are, then, you know,  
03:48:52 18 we'd have some very empty hallways here in Wilmington.

03:48:55 19 With regard to the remaining Jumara private  
03:49:00 20 interest factors, I think they all have to be considered  
03:49:03 21 neutral at best. So, factor three talks about whether  
03:49:06 22 claims in the case arose elsewhere rather than in Delaware.  
03:49:10 23 And here, of course, we have nationwide patent infringement  
03:49:14 24 claims that arise equally in all judicial districts,  
03:49:18 25 including Delaware.

Robocast's infringement claims in this case aren't addressed to the original design and development of YouTube's products in California, but whether YouTube's website is practicing the steps of the asserted method claims. And all that's been asserted in this case is method claims. And that infringement arises everywhere that YouTube is offering streaming video playlists over the Internet to computer users. So, of course, that's occurring equally in Delaware as it is anywhere else. And that becomes the neutral factor three.

Factor five, convenience of the witnesses, but only to the extent that necessary third-party witnesses would be unavailable for trial in Delaware, yet would be available for trial in the Northern District of California. Google-YouTube has failed to show that there would be some consequential number of necessary third-party witnesses who would be unavailable for trial in Delaware. Indeed, they haven't showed any such witnesses.

Instead, all we have in their motion papers are speculative attorney arguments that are unsupported by any evidence. For example, Google-YouTube asserts that some unnamed group of its former employees would be key witnesses or that some unnamed group of Apple employees would be unavailable witnesses in Delaware. But Google fails to identify who any of these people are. It fails to identify

03:50:46 1 where they live. It fails to identify what testimony of  
03:50:50 2 importance to this case they supposedly have. It fails to  
03:50:53 3 explain how or why they would be unavailable in Delaware.  
03:50:56 4 So, these are just completely speculative attorney arguments  
03:51:00 5 and nothing more.

03:51:01 6 All that Google-YouTube specifically identifies  
03:51:04 7 is a single prior art inventor, Alan Braverman, who it  
03:51:10 8 claims resides in the Northern District of California and  
03:51:13 9 would be unavailable for trial in Delaware. Now, even  
03:51:17 10 assuming that those unproven assertions are true, that would  
03:51:21 11 carry no meaningful weight in this balancing test. If you  
03:51:24 12 look at the face of these patents, you have between two and  
03:51:30 13 300 separate pieces of prior art that have been cited. And  
03:51:33 14 we're being told that the fact that one gentleman named  
03:51:36 15 Mr. Braverman lives in the Northern District of California  
03:51:39 16 is a critical fact that should tip the scales in this case.

03:51:45 17 And by the way, all of these patents issued over  
03:51:48 18 the Braverman reference. This Court denied all summary  
03:51:53 19 judgment arguments previously premised on the Braverman  
03:51:57 20 reference. And Mr. Braverman was fully deposed on his prior  
03:52:03 21 art in the Microsoft and Apple cases, and his deposition  
03:52:07 22 transcript is in our hands and fully available for use in  
03:52:09 23 this case.

03:52:10 24 So, at the end of the day, there's not really  
03:52:13 25 any substance behind Google-YouTube's assertions of

03:52:17 1 unavailable trial witnesses.

03:52:19 2 Factor six, and Your Honor mentioned this  
03:52:21 3 earlier, books and records. Location of books and records,  
03:52:26 4 but limited to the extent that they cannot be produced in  
03:52:29 5 Delaware. So, that's the legal standard. Google-YouTube  
03:52:34 6 focuses on the fact that certain of its documents are  
03:52:36 7 located in the Northern District of California, but that's  
03:52:40 8 not what the legal standard is. The legal standard is: Has  
03:52:43 9 it proven that there would be files or documents that could  
03:52:46 10 not be produced in Delaware? Of course, it's proven nothing  
03:52:50 11 of the sort, and I would say hasn't even attempted to argue  
03:52:53 12 that, which is the required legal standard. And even if the  
03:52:57 13 physical location of documents were the dispositive factor,  
03:53:00 14 which they aren't, we've already heard that all of  
03:53:03 15 Robocast's documents, literally the entirety, are in New  
03:53:07 16 York City right next door to Delaware.

03:53:09 17 So, public interest factors, and I'll make this  
03:53:14 18 quick because only one of them really is relevant. And I'm  
03:53:19 19 talking about factor eight, practical considerations. The  
03:53:24 20 practical considerations of judicial economy and judicial  
03:53:27 21 efficiency overwhelmingly weigh in favor of retaining  
03:53:31 22 jurisdiction in Delaware. By previously presiding over the  
03:53:36 23 Microsoft and Apple cases, this Court's developed extensive  
03:53:40 24 familiarity with those patents and technology, a highly  
03:53:44 25 relevant body of precedent. Three-and-a-half years of time



1 and effort on the Court's part and on Robocast's part were  
2 put into those cases. And as we said, the Court made all  
3 manner of substantive rulings on all kinds of issues that  
4 remain highly viable today. It would make no sense to send  
5 that to the Northern District of California and to have  
6 somebody figure that out all over again from scratch, much  
7 less create inconsistent rulings.

8 The Court said in your Round Rock decision,  
9 which we've quoted in the papers, the Court said, I quote,  
10 "Certainly if I already had some experience with the  
11 patents, it would be an important legitimate concern" in  
12 terms of retaining venue. Of course that's true.

13 And also, in terms of these practical  
14 considerations, the Court's already going to be handling the  
15 Netflix case. Judicial efficiency says that you don't want  
16 to have the two different cases in two different places. It  
17 would result in overlapping and duplicative work efforts.  
18 Transfer would cause a serious risk of inconsistent rulings  
19 between the two cases.

20 The only other public interest factor that I  
21 think really is decisive here, in one way or another, and  
22 it's not a big one, I guess, is factor 11, public policies  
23 of the fora. And Your Honor's held many times that Delaware  
24 encourages use of the Delaware courts here to resolve  
25 disputes between Delaware companies.

03:55:14 1 All the remaining public interest factors in  
03:55:18 2 Jumara are either neutral or completely inapplicable. So,  
03:55:22 3 in the neutral camp, factor seven, enforceability of  
03:55:26 4 judgment.

03:55:27 5 THE COURT: Right. I've got the neutral ones.

03:55:29 6 MR. HENSCHKE: Yeah.

03:55:30 7 THE COURT: Do you have anything else,  
03:55:31 8 Mr. Henschke?

03:55:34 9 MR. HENSCHKE: If there are any questions about  
03:55:36 10 Robocast's activities, I guess, based on what came up  
03:55:39 11 earlier, I would be happy to respond to those.

03:55:42 12 THE COURT: I don't think that's necessary. So,  
03:55:47 13 why don't you have a seat.

03:55:49 14 And, Mr. Jaffe, do you agree that Google's been  
03:55:59 15 Plaintiff to six to nine cases in this Court over what time  
03:56:02 16 period Mr. Henschke was referring to?

03:56:06 17 MR. JAFFE: Your Honor, I haven't gone back and  
03:56:09 18 looked at all the numbers exactly. I'm aware of the two  
03:56:12 19 that came up within the briefing. I'm not aware of the  
03:56:15 20 others on the exact numbers.

03:56:17 21 THE COURT: All right. The Vistaprint case,  
03:56:20 22 once upon a time I read that, but not in the last two weeks.  
03:56:25 23 What does that say about co-pending cases, as far as you're  
03:56:28 24 concerned?

03:56:29 25 MR. JAFFE: That the case is distinguishable

1 from the case here. In that case, no Defendant party was  
2 actually located in the transferee venue. And the presence  
3 of the witnesses in that location is not overwhelming. And  
4 I'm quoting Vistaprint 628 F.3d at 1346 through 47. So,  
5 that case is not analogous to us here.

6 If I may address just a couple points.

7 THE COURT: Yes. Please be quick.

8 MR. JAFFE: Sure. To boil it down, Plaintiff  
9 seems to think that because they litigated their prior case  
10 here, they get a free pass to litigate all cases here  
11 forever, regardless of the actual convenience of the parties  
12 under Section 1404. The Federal Circuit has instructed that  
13 it's the wrong approach and said, "just because a patent is  
14 litigated in a particular forum does not mean that the  
15 patent owner will necessarily have a free pass to maintain  
16 all future litigation involving that patent in that forum.  
17 See e.g. In Re: Google." And it's a case from earlier this  
18 year, May 2022. So, that's point one.

19 Counsel kept saying that the focal point of the  
20 case is going to be all these prior things. We are a  
21 different Defendant. We are not Microsoft. We are not  
22 Apple. Under the Genentech case, the bulk of the evidence  
23 is going to come from the Defendant. We are the Defendant,  
24 and the evidence is in the Northern District of California.

25 They keep referring to the prior case, and to

03:57:58 1 the extent that the evidence that they have in New York is  
03:58:02 2 related to Apple and Microsoft, that is not the relevant  
03:58:05 3 evidence we're looking at for purposes of this case,  
03:58:07 4 primarily speaking.

03:58:11 5 The other thing I wanted to mention, just to  
03:58:13 6 clarify a point, they brought up the IPRs --

03:58:16 7 THE COURT: Right. I was just -- yeah, go  
03:58:19 8 ahead.

03:58:20 9 MR. JAFFE: So, there were three IPRs that were  
03:58:22 10 filed on all three patents-in-suit. Those were not filed by  
03:58:26 11 Google or YouTube. Two were filed by Netflix, and one was  
03:58:30 12 filed by another -- by a firm called Unified Patents.

03:58:33 13 THE COURT: Right. I've heard of that.

03:58:36 14 MR. JAFFE: These go -- actually support the  
03:58:38 15 transfer decision. And then those are different situations.  
03:58:41 16 Netflix is differently situated, as things currently stand,  
03:58:45 17 from Google. They have their own IPRs, as those things  
03:58:49 18 stand today, that Google did not file. So, it kind of shows  
03:58:54 19 the divergence of the cases at this point in that their IPRs  
03:58:57 20 have taken one stance where Google has not filed IPRs on  
03:59:00 21 these at this moment.

03:59:01 22 I also wanted to address the kind of inequities  
03:59:07 23 of the parties that counsel mentioned. And I want to go  
03:59:10 24 back to Your Honor's decision in the Express Mobile case.  
03:59:13 25 And Your Honor addressed the exact argument that Plaintiff

03:59:17 1 attempts to make here. And I'm going to quote. "Plaintiff  
03:59:21 2 argues that Defendant is a \$2 billion company that would not  
03:59:26 3 suffer any undue financial burden if litigated in Delaware."  
03:59:30 4 I'm going to omit the cite. "Defendant certainly has the  
03:59:33 5 capability of litigating in Delaware; however, it is  
03:59:36 6 unreasonable to subject all parties to an inconvenient forum  
03:59:40 7 when a forum exists that would significantly reduce the  
03:59:43 8 burden of at least one of the parties."

03:59:46 9 That's the situation we find ourselves in here  
03:59:48 10 where the Northern District of California is the more  
03:59:51 11 convenient for the Defendants as well as closer to the  
03:59:55 12 location of the CEO and the COO where the principal office  
04:00:00 13 of the Plaintiff is in Idaho. I noticed that counsel didn't  
04:00:04 14 address Mr. Torres and his role in the business. If you  
04:00:08 15 were to hear them say it, the CEO apparently has no role in  
04:00:11 16 the day-to-day operations of the business, which seems  
04:00:14 17 counter to the title itself.

04:00:19 18 And the other thing I wanted to mention is in  
04:00:22 19 terms of where the claims arise for purposes of that Jumara  
04:00:29 20 factor, counsel mentioned that the claims arise anywhere.

04:00:31 21 THE COURT: No, I got that one.

04:00:34 22 MR. JAFFE: All right.

04:00:35 23 THE COURT: All right. So, then let's be done.

04:00:40 24 MR. JAFFE: Thank you.

04:00:41 25 THE COURT: Let me just take a short break here.

04:00:45 1 All right. I'll be right back.

04:00:47 2 DEPUTY CLERK: All rise.

04:03:19 3 (Recess was taken.)

04:08:55 4 DEPUTY CLERK: All rise.

04:08:57 5 THE COURT: So, let's be seated. So, I do  
04:09:15 6 follow the Section 1404(a) transfer analysis that's in  
04:09:20 7 *Jumara vs. State Farm Insurance Company*, 55 F.3d 873, which  
04:09:27 8 is a Third Circuit case from 1995.

04:09:31 9 I, of course, also consider the various Federal  
04:09:36 10 Circuit cases occasionally interpreting Third Circuit law,  
04:09:39 11 mostly interpreting Fifth Circuit law, but they are  
04:09:42 12 relevant. And so, nobody's disputing there is jurisdiction  
04:09:46 13 in the Northern District of California. So, I have the  
04:09:50 14 power to transfer this case to the Northern District of  
04:09:55 15 California.

04:09:55 16 And no one disputes that the burden that's  
04:10:01 17 establishing the need for transfer rests with the moving  
04:10:04 18 party here, Google and YouTube. And so, there are the  
04:10:08 19 various *Jumara* interests that I'm supposed to consider which  
04:10:12 20 the parties have mostly touched on in their argument today.  
04:10:19 21 You know, there is Plaintiff's forum preference as  
04:10:23 22 manifested in their original choice, which as I've said on  
04:10:28 23 various occasions before, is the paramount consideration,  
04:10:36 24 which is what Third Circuit law says.

04:10:39 25 But I have also said that it's not quite as

04:10:45 1 strong when the Plaintiff's only connection to Delaware is  
04:10:53 2 its incorporation here. That then it's really not  
04:11:00 3 Plaintiff's home turf. It doesn't mean it's not the  
04:11:04 4 paramount consideration which, as I've said, to me means the  
04:11:09 5 most important, but it gets slightly less weight in the  
04:11:16 6 balancing. And, you know, sometimes the judges here are  
04:11:20 7 arguing back and forth as to whether that's connected with  
04:11:24 8 this factor or one of the other factors, but it works into  
04:11:30 9 the analysis somewhere.

04:11:32 10 I consider the Defendants' preference, which is  
04:11:35 11 the Northern District of California. And, you know, the  
04:11:44 12 Defendants have a perfectly rational choice for wanting to  
04:11:48 13 litigate in the Northern District of California, that is, I  
04:11:53 14 think, entitled to significant weight. It's not entitled to  
04:11:58 15 as much weight as the Plaintiff's choice, but it is here a  
04:12:02 16 significant factor as it usually is. And then really then  
04:12:10 17 the question is: How do the rest of the factors play out?

04:12:13 18 You know, the third factor is whether the claim  
04:12:17 19 arose elsewhere. And in this connection, I don't agree with  
04:12:24 20 the Plaintiff so much that this is a factor that favors the  
04:12:31 21 Plaintiff. I think it's a factor that actually favors the  
04:12:34 22 Defendant because the Federal Circuit has, on a number of  
04:12:42 23 occasions, said, in so many words, that in terms of wherever  
04:12:48 24 the claim arises, it's where the infringing technology is  
04:12:51 25 developed, not where, you know, for example, a product is

04:12:57 1 sold. And so, I think this -- it seems to be undisputed  
04:13:03 2 that Google and YouTube developed whatever exactly the  
04:13:08 3 accused product is somewhere in the Bay area. And so, this  
04:13:17 4 marginally favors transfer.

04:13:19 5 The fourth factor is the convenience of the  
04:13:22 6 parties as indicated by their relative physical and  
04:13:25 7 financial condition. I think pretty clearly this factor  
04:13:29 8 favors Robocast. Robocast is a four-person company. Google  
04:13:36 9 is still omnipresent everywhere. I guess that's what  
04:13:52 10 omnipresent means. And, you know, it's one of the most  
04:14:01 11 financially successful corporations, particularly Google,  
04:14:07 12 you know, anywhere. So, the consideration here is in favor  
04:14:23 13 of Robocast because they are a four-person company with  
04:14:27 14 apparently little or no current income.

04:14:29 15 The fifth factor is the convenience of the  
04:14:33 16 witnesses, but only to the extent the witnesses may actually  
04:14:36 17 be unavailable for trial in whatever fora. And here, you  
04:14:42 18 know, Google's track record on this is not so good. They  
04:14:47 19 said two people in the briefs. One of them was pointed out  
04:14:50 20 lives in Washington, which tends to make them at least not  
04:14:55 21 subject to the subpoena power of either Court.

04:14:58 22 The other one is Mr. Braverman. And I believe  
04:15:07 23 Mr. Jaffe said when I asked, well, where is he, he said,  
04:15:11 24 well, based on his LinkedIn page, he's still in the Northern  
04:15:16 25 District of California. And I accept that. But one of the



04:15:21 1 things it indicates to me, I haven't heard anything that  
04:15:24 2 makes the suggestion that Mr. Braverman would be unwilling  
04:15:30 3 to come to Delaware if requested. He certainly couldn't be  
04:15:36 4 subpoenaed.

04:15:37 5 And one of the things that I had done before the  
04:15:41 6 argument today, but I had only done it partly, was I looked  
04:15:45 7 at the witness list in the Pretrial Order in the 10-1055  
04:15:52 8 case, which was the Microsoft lawsuit. And in that case, in  
04:16:00 9 Document 5, Docket Item 508-5 filed in February of 2014,  
04:16:10 10 Microsoft listed Mr. Braverman as a witness. And in the way  
04:16:17 11 things are done in that particular Pretrial Order, under the  
04:16:21 12 expect to call or may call, they had him down as may call.  
04:16:25 13 And under the in person or by deposition, they had him down  
04:16:28 14 as in person or by deposition. And they had a number of  
04:16:33 15 other people who are in person. They had a number of people  
04:16:37 16 who were by deposition. But certainly the indication one  
04:16:40 17 would get from this is that Microsoft, ten days before  
04:16:43 18 trial, thought that if they wanted -- that there was a  
04:16:48 19 reasonable possibility that Mr. Braverman would appear in  
04:16:51 20 Delaware for a trial.

04:16:53 21 So, I think in terms of the Defendants showing  
04:17:00 22 that there's a witness who's arguably important and is  
04:17:05 23 unavailable for trial, I don't think they've shown that.  
04:17:10 24 So, I think that that under the Third Circuit law is pretty  
04:17:17 25 much neutral.

04:17:18 1                   The location of books and records "similarly  
04:17:22 2                   limited to the extent that the files could not be produced  
04:17:25 3                   in the alternative forum," I think Mr. Henschke said this,  
04:17:31 4                   the only books and records, with the one exception of  
04:17:36 5                   reference to Mr. Braverman's former -- of course, through  
04:17:43 6                   pretrial subpoena -- so, anything that the Defendants or the  
04:17:47 7                   Plaintiff has, that could be produced in Delaware. In my  
04:17:56 8                   experience, anything anybody else in the United States has  
04:18:00 9                   can also be produced in Delaware by doing a deposition  
04:18:03 10                  subpoena before trial. So, I think that is pretty much  
04:18:08 11                  neutral, too.

04:18:09 12                 The public interest, which the parties didn't  
04:18:14 13                 spend a lot of time on and probably for good reason because  
04:18:17 14                 a lot of them are pretty much just neutral enforceability of  
04:18:21 15                 the judgment, that's neutral.

04:18:24 16                 The familiarity of the trial judge with the  
04:18:28 17                 applicable state law in diversity cases, that is not  
04:18:31 18                 applicable.

04:18:32 19                 The public policies of the fora, Mr. Henschke  
04:18:36 20                 cited correctly that at various times in the distant past  
04:18:42 21                 and perhaps in the first Robocast transfer cases that I  
04:18:48 22                 said, you know, Delaware has a public policy favoring that  
04:18:52 23                 Delaware corporations litigate in Delaware. You know, I've  
04:18:58 24                 since considered that a little more, and I think that the  
04:19:01 25                 more precise statement is public policy is that Delaware

04:19:06 1 corporations litigate in the State Courts in Delaware. I  
04:19:09 2 don't think Delaware cares who litigates in federal courts.  
04:19:13 3 So, I think that's neutral.

04:19:15 4 One of the factors that nobody mentioned today  
04:19:19 5 was the "local interest in deciding local controversies at  
04:19:23 6 home." You know, patent litigation is not a local  
04:19:28 7 controversy, and so I think that's neutral.

04:19:31 8 Then the other two, which there was more  
04:19:35 9 discussion, either today or in the briefing, let me first  
04:19:38 10 address "the relevant administrative difficulty in the two  
04:19:42 11 fora resulting from Court congestion." And the parties  
04:19:47 12 cited different statistics in their briefing.

04:19:50 13 One side cited weighted average case, which is  
04:19:55 14 what Delaware judges tend to prefer because we think that  
04:19:59 15 gives a better idea of how much work there actually is. But  
04:20:02 16 the other cited just raw numbers. The raw numbers suggest  
04:20:08 17 heavier case loads in the Northern District of California.  
04:20:12 18 The weighted case load suggests heavier case load in this  
04:20:15 19 district.

04:20:18 20 As a practical matter, though, I think it's  
04:20:22 21 pretty close. And one of the things that both sides cited,  
04:20:26 22 I believe, was how long it takes to get to trial. In the  
04:20:32 23 one district, it was 32 months. And the other one, it was  
04:20:35 24 33 months. So, those might not be the exact numbers, but  
04:20:40 25 the numbers were in the briefing. And there was essentially

04:20:42 1 a one-month difference, which to me, given the imprecision  
04:20:49 2 of which is such a small difference as to be negligible, and  
04:21:01 3 I think not borne out in any particular case. So, I think  
04:21:06 4 the relevant administrative difficulties essentially is  
04:21:10 5 neutral, too.

04:21:10 6 And then there are the practical considerations  
04:21:13 7 to make the trial easy, expeditious or inexpensive. And  
04:21:21 8 it's true that in some other cases, I have said something  
04:21:24 9 like, because I think this is the way to do it, that we're  
04:21:31 10 kind of looking at the overall cost to the parties.

04:21:40 11 So, that, for example, in the Express Mobile  
04:21:44 12 where the Plaintiff was from California, and Delaware and  
04:21:49 13 Florida were both roughly the same lengthy plane ride away,  
04:21:55 14 the fact that it really didn't have any impact on the  
04:21:59 15 Plaintiff didn't mean that the fact that the Defendant would  
04:22:05 16 there -- it would be much easier for the Defendant in  
04:22:07 17 Florida, which is where they were. You know, I thought that  
04:22:13 18 was significant.

04:22:18 19 You know, it's a lot harder in terms of  
04:22:31 20 Robocast, or actually this was part of the reason why I was  
04:22:35 21 really looking at the Microsoft list of witnesses. Because  
04:22:41 22 in the Microsoft trial, this is Docket Item 508-3 you know,  
04:22:50 23 after Mr. Torres and Jenna Torres, who I take it is not one  
04:22:58 24 of the four people who still works there, or maybe she never  
04:23:02 25 worked there.

04:23:03 1 But the next person listed is Brett Smith, and  
04:23:07 2 it says next to it may call in person. I heard that he was  
04:23:12 3 the 30(b)(6) witness ten years ago. I suspect he may be the  
04:23:18 4 30(b)(6) witness again.

04:23:21 5 And the point, I guess, is that it's a relative  
04:23:42 6 wash, I think, in terms of -- based on the record I have in  
04:23:45 7 front of me as to what might make the trial easy,  
04:23:49 8 expeditious or inexpensive for Robocast. You know, there  
04:23:55 9 would be some savings clearly for Google if it were in the  
04:23:59 10 Northern District of California. So, I guess this factor  
04:24:06 11 marginally favors Google.

04:24:09 12 I've also considered a couple other things. I  
04:24:16 13 considered -- you know, part of the backdrop to this is  
04:24:20 14 there are no witnesses or documents in Delaware. But I've  
04:24:25 15 also considered, and we had some discussion today about  
04:24:30 16 Netflix and the co-pending case. And so, in terms of the  
04:24:48 17 co-pending case, Mr. Henschke had cited Vistaprint. And so,  
04:24:54 18 I, during the break, got at least part of Vistaprint, which  
04:25:02 19 is at 628 F.3d 1342, Federal Circuit 2010. And I believe  
04:25:08 20 that was a mandamus from Texas, but maybe it was -- whatever  
04:25:14 21 it was, it was a Federal Circuit decision.

04:25:17 22 And the quote I have here, "Our holding today  
04:25:24 23 does not mean that once the patent is litigated in a  
04:25:28 24 particular venue, the patent owner will necessarily have a  
04:25:31 25 free pass to maintain all future litigation involving the

04:25:35 1 patent in that venue. However, whereas here, the trial  
04:25:40 2 Court performed a detailed analysis explaining they're very  
04:25:44 3 familiar with the only asserted patent and the related  
04:25:47 4 technology and where there is co-pending litigation before  
04:25:50 5 the trial Court involving the same patent-in-suit and  
04:25:55 6 pertaining to the same underlining technology and accusing  
04:25:58 7 similar services. We cannot say the trial Court clearly  
04:26:01 8 abused its discretion denying transfer." It sounds like  
04:26:06 9 this was a mandamus decision.

04:26:08 10 And, you know, I'm not as optimistic as  
04:26:16 11 Mr. Henschke that the technical details of this litigation  
04:26:22 12 or of this technology will come back to me. I do tend to  
04:26:29 13 agree with Mr. Henschke that I have some leg up on any other  
04:26:36 14 judge trying to interpret the various things that I wrote  
04:26:40 15 and that I did write a lot of things in both the Microsoft  
04:26:43 16 and the Apple case. And I do remember a lot of the  
04:26:54 17 non-technological parts of the cases.

04:26:59 18 And so, and I do agree with Mr. Jaffe that this  
04:27:06 19 was ten years ago, more or less. But certainly I'm pretty  
04:27:12 20 sure that I'm the only federal judge in the country that has  
04:27:15 21 any familiarity with, I believe, it's the '541 Patent. And  
04:27:20 22 I do expect the other two patents have fairly related  
04:27:25 23 technology. And so, I think that even if my recall of what  
04:27:33 24 I did before, certainly is going to need a big memory jog to  
04:27:38 25 be useful, I do think that the co-pending litigation that's

04:27:45 1 before me involving the same three patents-in-suit, one of  
04:27:48 2 which is the patent-in-suit that I did ten years ago, that,  
04:27:52 3 obviously, it would have to involve the same underlying  
04:27:55 4 technology because it's the same patent-in-suit. I don't  
04:28:00 5 know whether the services accused are similar or not, but  
04:28:05 6 that seems to me to at least factor in marginally the  
04:28:09 7 balance in favor of me not transferring the case.

04:28:13 8 So, in any event, when considering all of these  
04:28:36 9 things together, and particularly when considering the Third  
04:28:42 10 Circuit law about Plaintiff's forum preference, I don't  
04:28:47 11 think that the Defendants have met their burden of showing  
04:28:53 12 that I should transfer this case to the Northern District of  
04:28:59 13 California. So, I'm going to deny their motion, and I will  
04:29:04 14 sign some Order to that effect pretty soon.

04:29:07 15 All right. So, that's it for today.

04:29:12 16 Have the Defendants answered the Complaint?

04:29:16 17 MR. JAFFE: Yes, Your Honor.

04:29:17 18 THE COURT: Okay. So, I expect you're going  
04:29:25 19 to -- have you gotten a call from my office already yet --  
04:29:29 20 probably not given this motion -- saying that you should,  
04:29:32 21 you know, come up with a schedule?

04:29:34 22 MR. JAFFE: No, we have not.

04:29:36 23 THE COURT: Okay. Well, I'm sure you'll get it  
04:29:38 24 from a more efficient person than me, but why don't you  
04:29:41 25 start working on considering the schedule. Do you have a

04:29:44 1 sense, either one of you, because, obviously, it would be  
04:29:49 2 nice to have a coordinated schedule with Netflix. Though,  
04:29:52 3 if they're busy choosing IPRs and pursuing IPRs, they may be  
04:29:58 4 not that interested.

04:30:00 5 In any event, as far as you know, there's  
04:30:11 6 nothing in the Netflix case prohibiting or that I need to  
04:30:15 7 decide before deciding to at least find out what they want  
04:30:18 8 to do; right?

04:30:20 9 MR. HENSCHKE: They're pending.

04:30:22 10 THE COURT: All right. Well, we'll put out some  
04:30:29 11 notice to try to get all three parties in for a scheduling  
04:30:33 12 conference in the new year.

04:30:38 13 Anything else?

04:30:40 14 MR. HENSCHKE: Does Your Honor have any sense of  
04:30:42 15 how far out that's likely to be scheduled from now?

04:30:48 16 THE COURT: No.

04:30:51 17 MR. HENSCHKE: Fair enough.

04:30:52 18 THE COURT: All right. So, off the record,  
04:30:54 19 could I see Mr. Cottrell and Mr. Brauerman for a minute?  
04:31:04 20 And we'll be in recess.

04:31:06 21 DEPUTY CLERK: All rise.

22 (Court was recessed at 4:31 p.m.)

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1 I hereby certify the foregoing is a true and  
2 accurate transcript from my stenographic notes in the  
3 proceeding.

4 /s/ Heather M. Triozzi  
5 Certified Merit and Real-Time Reporter  
6 U.S. District Court  
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